

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CONNIE J. ARQUETTE,	)	
	)	No. CV-07-3051-CI
Plaintiff,	)	
	)	ORDER DENYING PLAINTIFF'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	AND DIRECTING ENTRY OF
MICHAEL J. ASTRUE,	)	JUDGMENT FOR DEFENDANT
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 24, 27.) The parties have consented to proceed before a magistrate judge. (Ct. Rec. 9.) Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney Leisa A. Wolf represents Defendant. After reviewing the administrative record and the briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment and directs entry of judgment in favor of Defendant.

Plaintiff, who was 44 at the time of the hearing, protectively filed for disability insurance benefits and Supplemental Security Income (SSI) benefits on June 18, 2004, alleging an onset date June 3, 2004. (Tr. 50, 83, 169.) She claims disability due to slipped disc, lower back and leg pain, and anxiety/stress. (Tr. 82.) Plaintiff was a widow with adult children, and had a 11<sup>th</sup> grade

1 education which included special education classes in reading and  
2 spelling. (Tr. 118, 169.) Plaintiff testified she had past work  
3 experience as a laundry worker, a hotel maid, a hospital cleaner,  
4 food service worker, and kitchen and dietary aide. (Tr. 183-87,  
5 194-95.) She also testified she provided in-home care for her  
6 significant other who has diabetes and with whom she lives. (Tr.  
7 188-89.) She stated she quit her last job because she did not get  
8 along with her supervisor. Now, because of back pain, she could  
9 walk for about one hour, sit one half hour to one hour at a time,  
10 and she suffers from headaches that she has had since she was a  
11 teenager. (Tr. 176, 181.) Following a denial of benefits and  
12 reconsideration, a hearing was held before Administrative Law Judge  
13 (ALJ) Mary Reed. (Tr. 167-99.) The ALJ denied benefits; review was  
14 denied by the Appeals Council. (Tr. 5-7.) This appeal followed.  
15 Jurisdiction is appropriate pursuant to 42 U.S.C. § 405(g).

#### 16 ADMINISTRATIVE DECISION

17 The ALJ concluded Plaintiff had not engaged in substantial  
18 gainful activity and was insured for disability benefits through  
19 December 31, 2008. (Tr. at 16.) At steps two and three, the ALJ  
20 found Plaintiff had the severe impairments of degenerative disc  
21 disease of the lumbar spine and headaches, but these impairments did  
22 not meet the requirements of 20 C.F.R. Part 404, Subp. P, Appendix  
23 1 (Listings). (Tr. 17.) At step four, ALJ Reed made the following  
24 residual functional capacity (RFC) finding: "[C]laimant has the  
25 residual functional capacity to perform light work exertion with  
26 lifting and carrying 20 pounds occasionally and 10 pounds  
27 frequently. She is capable of sitting for 6 hours out of 8 hours  
28 with normal breaks; and standing/walking 6 hours out of an 8-hour

1 workday with normal breaks. She should avoid climbing ladders,  
2 ropes and scaffolds and is limited to only occasional stooping."  
3 (Ct. 18.) Based on the record and testimony from a vocational  
4 expert, the ALJ determined Plaintiff was capable of performing her  
5 past relevant work, as performed by Plaintiff, as a food service  
6 worker and hospital/dietary aide. (Tr. 22.) She concluded  
7 Plaintiff was not "disabled" as defined by the Social Security Act.  
8 (Tr. 23.)

### 9 ISSUES

10 The question presented is whether there was substantial  
11 evidence to support the ALJ's decision denying benefits and, if so,  
12 whether that decision was based on proper legal standards.  
13 Plaintiff asserts the ALJ erred when she (1) failed to fully develop  
14 the record; (2) improperly found Plaintiff not credible; (3)  
15 improperly rejected the treating physician's testimony; and (4)  
16 failed to make an adequate step four analysis. (Ct. Rec. 25 at 6.)

### 17 STANDARD OF REVIEW

18 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
19 court set out the standard of review:

20 The decision of the Commissioner may be reversed only if  
21 it is not supported by substantial evidence or if it is  
22 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,  
23 1097 (9th Cir. 1999). Substantial evidence is defined as  
24 being more than a mere scintilla, but less than a  
25 preponderance. *Id.* at 1098. Put another way, substantial  
26 evidence is such relevant evidence as a reasonable mind  
27 might accept as adequate to support a conclusion.  
28 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the  
evidence is susceptible to more than one rational  
interpretation, the court may not substitute its judgment  
for that of the Commissioner. *Tackett*, 180 F.3d at 1097;  
*Morgan v. Commissioner of Soc. Sec. Admin.* 169 F.3d 595,  
599 (9th Cir. 1999).

The ALJ is responsible for determining credibility,  
resolving conflicts in medical testimony, and resolving

ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

#### SEQUENTIAL PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . ." 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

In evaluating whether a claimant suffers from a disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made. 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the burden of proving that [s]he is disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from licensed medical professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b), 404.1513(d)).

#### DISCUSSION

##### 1. Credibility

Plaintiff contends the ALJ erred in her credibility determination when she failed to give adequate reasons for rejecting Plaintiff's testimony. (Ct. Rec. 25 at 12-16.) Defendant responds

1 that the ALJ gave legally sufficient, "clear and convincing" reasons  
2 for discounting Plaintiff's subjective symptom complaints. (Ct.  
3 Rec. 28 at 10-11.)

4 The ALJ must engage in a two-step analysis in deciding whether  
5 to admit a claimant's subjective symptom testimony. *Smolen v.*  
6 *Chater*, 80 F.3d 1273, 1281 (9<sup>th</sup> Cir. 1996). Under the first step,  
7 the claimant must produce objective medical evidence of an  
8 underlying "impairment," and must show that the impairment, or a  
9 combination of impairments, "could reasonably be expected to produce  
10 pain or other symptoms." *Cotton v. Bowen*, 799 F.2d 1403, 1405 (9<sup>th</sup>  
11 Cir. 1986). Once the *Cotton* test is met, the ALJ must evaluate the  
12 credibility of the claimant. *Smolen*, 80 F.3d at 1281-82. If there is  
13 no affirmative evidence of malingering, the ALJ must provide "clear  
14 and convincing" reasons for rejecting Plaintiff's pain and/or  
15 symptom testimony. *Rollins v. Massanari*, 261 F.3d 853, 858 (9<sup>th</sup> Cir.  
16 2001); *Smolen*, 80 F.3d at 1283-84. The ALJ may consider the  
17 following factors when weighing the claimant's credibility:  
18 "[claimant's] reputation for truthfulness; inconsistencies either in  
19 [claimant's] testimony or between [his/her] testimony and [his/her]  
20 conduct; [claimant's] daily activities; [his/her] work record; and  
21 testimony from physicians and third parties concerning the nature,  
22 severity, and effect of the symptoms of which [claimant] complains."  
23 *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9<sup>th</sup> Cir. 1997). If the  
24 ALJ's credibility finding is supported by substantial evidence in  
25 the record, the court may not engage in second-guessing. See  
26 *Morgan*, 169 F.3d at 600. If a reason given by the ALJ is not  
27 supported by the evidence, the ALJ's decision may be supported under  
28 a harmless error standard. *Curry v. Sullivan*, 925 F.2d 1127, 1131

1 (9<sup>th</sup> Cir. 1990) (applying the harmless error standard); *Booz v.*  
2 *Secretary of Health and Human Serv.*, 734 F.2d 1378, 1380 (9<sup>th</sup> Cir.  
3 1984).

4 Here, after properly considering the objective medical evidence  
5 and finding it did not support the Plaintiff's testimony, the ALJ  
6 gave additional reasons for rejecting the severity alleged by  
7 Plaintiff. (Tr. 20-21.) Specifically, the ALJ found the record  
8 included representations by Plaintiff that she provided in-home care  
9 for her significant other, who had a serious diabetes condition.  
10 (Tr. 20, 188.) Plaintiff indicated she drove him to his doctor  
11 appointments, assisted him dressing, did the shopping and all of the  
12 household chores except mopping. (Tr. 188-89.) She also indicated  
13 she cooked, did crafts and models, crocheted, watched television,  
14 read, shopped and visited with friends and her sons regularly and  
15 spent about four hours daily at the computer playing games and e-  
16 mailing. (Tr. 70, 189-92.) The record in its entirety supports the  
17 ALJ's specific findings that Plaintiff's reported activities of  
18 daily living are inconsistent with her allegations of total  
19 disability. When a claimant can spend a substantial part of his  
20 day engaged in the performance of physical activity which is  
21 transferable to a work setting, such a finding is sufficient to  
22 discredit allegations of disability. See *Morgan*, 169 F.3d at 599-  
23 600 (*citing Fair v. Bowen*, 885 F.2d 597, 603 (9<sup>th</sup> Cir. 1989)).

24 Further, the ALJ cited evidence of physician's reports that  
25 Plaintiff's symptoms were relieved with over the counter medication,  
26 that she had had sinus problems and headaches since she was a  
27 teenager and this had not prevented her from working. The ALJ also  
28 noted there were significant periods during which she did not

1 require any medication. (Tr. 20-21.) The ALJ's gave "clear and  
2 convincing" reasons to discount the severity of Plaintiff's symptom  
3 testimony. *Batson v. Comm. of the Soc. Sec. Admin.*, 359 F.3d 1190,  
4 1196 (9<sup>th</sup> Cir. 2004).

5 2. ALJ's Duty to Develop the Record

6 The ALJ found no evidence of a severe mental impairments,  
7 reasoning that "the record does not reflect the claimant has any  
8 mental impairment and her anxiety/stress appears to be short term  
9 and situational." (Tr. 17.) Plaintiff argues the ALJ had a duty  
10 to order a consultative examination to explore the possibility of  
11 mental impairments. (Ct. Rec. 25 at 9-10.) This argument is  
12 without merit.

13 In Social Security proceedings, the burden of proof is on the  
14 claimant to prove the existence of a severe physical or mental  
15 impairment by providing medical evidence consisting of signs,  
16 symptoms, and laboratory findings; the claimant's own statement of  
17 symptoms alone will not suffice. 20 C.F.R. §§ 404.1508, 416.908.  
18 As a threshold to establishing an impairment, it is the claimant's  
19 responsibility to produce sufficient objective medical evidence of  
20 underlying impairment to show that the impairment, or a combination  
21 of impairments, "could reasonably be expected to produce pain or  
22 other symptoms." *Cotton*, 799 F.2d 1403.

23 Once medical evidence is provided by the claimant, the  
24 Regulations state the agency "will develop your complete medical  
25 history for at least the 12 months preceding the month in which you  
26 file your application unless there is a reason to believe that  
27 development of an earlier period is necessary." 20 C.F.R.  
28 § 404.1512 (d), 416.912 (d). An ALJ's duty to develop the record

1 further is triggered "only when there is ambiguous evidence or when  
2 the record is inadequate for proper evaluation of evidence." *Mayes*  
3 *v. Massanari*, 276 F.3d 453, 4509-60 (9<sup>th</sup> Cir. 2001) (*citing*  
4 *Tonapetyan v. Halter*), 242 F.3d 1144, 1150 (9<sup>th</sup> Cir. 2001)). To  
5 further develop the record, the Commissioner may order consultative  
6 examinations at the agency's expense. However, the Commissioner has  
7 "broad latitude in ordering a consultative examination," *Diaz v.*  
8 *Secretary of Health and Human Services*, 898 F.2d 774, 778 (10<sup>th</sup> Cir.  
9 1990). Consultative exams are purchased to resolve a conflict or  
10 ambiguities "if one exists." 20 C.F.R. § 404.1519a(2). However,  
11 as explained by the Tenth Circuit, the claimant has the burden to  
12 raise the issue, *i.e.*, there must be sufficient objective evidence  
13 in the record to suggest the "existence of a condition which could  
14 have a material impact on the disability decision." *Hawkins v.*  
15 *Chater*, 113 F.3d 1162, 1167 (10<sup>th</sup> Cir. 1997.) "Isolated and  
16 unsupported comments by the claimant are insufficient, by  
17 themselves, to raise the suspicion of the existence of a  
18 nonexertional impairment." *Id.*

19 Here, Plaintiff argues there are "factors" in the record that  
20 establish a "likelihood of undeveloped mental health impairments."  
21 (Ct. Rec. 25 at 10.) The ALJ, however, specifically found the  
22 record did not warrant additional consultative examinations. She  
23 found Plaintiff's anxiety was short term and situational, and  
24 Plaintiff was neither prescribed medication for anxiety and/or  
25 stress, nor did she seek professional mental health treatment. (Tr.  
26 17.) The ALJ concluded any limitations caused by anxiety or stress  
27 had minimal impact on Plaintiff's ability to work. These findings  
28 are supported reasonably by the record.



1 For example, examining physician Marie Ho, M.D., reported  
2 Plaintiff's stress was primarily related to money worries. (Tr.  
3 118.) The record also confirms that treating physician Joseph  
4 Vicker, M.D., made no mention of significant mental impairments or  
5 concerns and did not prescribe medication for chronic anxiety. (Tr.  
6 99-103, 149.) In October 2005, Dr. Holland at Dr. Vicker's office  
7 noted Plaintiff reported stress due to her relationship with her  
8 significant other, who had diabetes and pain issues. (Tr. 141.)  
9 Plaintiff reported she had trouble falling asleep due to this  
10 stress. Other purported evidence of an alleged mental impairment is  
11 based on Plaintiff's self-report, which as discussed above, was  
12 often inconsistent and properly found not fully credible by the ALJ.  
13 Plaintiff further stated in her written disability report that she  
14 gets along with people and has no problems with authority figures.  
15 (Tr. 72.) She also reported to Dr. Ho that she sometimes avoids  
16 people altogether, but she was not depressed or sad. (Tr. 118.)

17 As for cognitive abilities, Plaintiff testified she attended  
18 special education for spelling and reading in school, but now is  
19 able to read pretty well, with some comprehension problems.  
20 Plaintiff stated she had no problem remembering what she read if it  
21 is interesting. (Tr. 169-70.) None of the medical reports  
22 indicated significant cognitive deficiencies. Although Plaintiff  
23 indicated problems with math, and testified at the hearing she could  
24 not compute change at the store, she stated in her written report  
25 that she could use her checkbook, handle her savings account, count  
26 change and pay her bills. (Tr. 69, 171.) She also testified she  
27 was capable of computer work and craft modeling. Plaintiff's  
28 speculation that reasons exist that may establish "undeveloped

1 mental health impairments" is not sufficient to render the ALJ's  
2 decision reversible. As stated by the Tenth Circuit, the  
3 Commissioner has broad latitude in deciding whether to order  
4 additional medical examination at the agency's expense. The record  
5 in its entirety supports the ALJ Reed's determination that  
6 additional examinations were not provided.

7 3. Treating Physician Opinion

8 Plaintiff next argues the ALJ erred when she rejected Dr.  
9 Vicker's opinion that Plaintiff would need to lie down during the  
10 day due to headaches, had to elevate her legs to relieve swelling  
11 and would miss four or more days of work per month. Plaintiff  
12 contends if these treating physician opinions were properly  
13 credited, a finding of disability would be warranted. (Ct. Rec. 25  
14 at 10-11.)

15 In a disability proceeding, the treating physician's opinion is  
16 given special weight because of familiarity with the claimant and  
17 her physical condition. See *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th  
18 Cir. 1989). If the treating physician's opinions are not  
19 contradicted, they can be rejected only with "clear and convincing"  
20 reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). If  
21 contradicted, the ALJ may reject the opinion if he states specific,  
22 legitimate reasons that are supported by substantial evidence. See  
23 *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463  
24 (9th Cir. 1995); *Fair*, 885 F.2d at 605. While a treating  
25 physician's uncontradicted medical opinion will not receive  
26 "controlling weight" unless it is "well-supported by medically  
27 acceptable clinical and laboratory diagnostic techniques," Social  
28 Security Ruling 96-2p, it can nonetheless be rejected only for

1 "'clear and convincing' reasons supported by substantial evidence in  
2 the record." *Holohan v. Massanari*, 246 F.3d 1195, 1202 (9th Cir.  
3 2001) (quoting *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir.  
4 1998)). A treating physician's opinion "on the ultimate issue of  
5 disability" must itself be credited if uncontroverted and supported  
6 by medically accepted diagnostic techniques unless it is rejected  
7 with "clear and convincing" reasons. *Holohan*, 246 F.3d at 1202-03.

8 Historically, the courts have recognized conflicting medical  
9 evidence, the absence of regular medical treatment during the  
10 alleged period of disability, and the lack of medical support for a  
11 doctor's report based substantially on a claimant's subjective  
12 complaints, as specific, legitimate reasons for disregarding the  
13 treating physician's opinion. See *Flaten*, 44 F.3d at 1463-64; *Fair*,  
14 885 F.2d at 604-05.

15 The rejection of a brief, conclusory opinion is not legal  
16 error. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001)  
17 (upholding ALJ's rejection of treating physician's opinion as  
18 unsupported by rationale, objective medical findings, treatment  
19 notes, or even a clinical observation); *Matney v. Sullivan*, 981 F.2d  
20 1016, 1019 (9th Cir. 1992).

21 The opinions relied up on by Plaintiff are found in a two-page  
22 questionnaire completed by Dr. Vicker on July 5, 2006. (Tr. 137-  
23 38.) Medical records indicate Dr. Vicker treated Plaintiff from  
24 February 2003 to January 2004 (Tr. 98-103) and April 26, 2005 to  
25 July 6, 2006. (Tr. 137-46.) The ALJ summarized the medical  
26 evidence and found the limitations opined by Dr. Vicker were not  
27 consistent with other medical records, including the clinical  
28 examination by Dr. Marie Ho and Dr. Vicker's own clinical notes.

(Tr. 21.) Specifically, the ALJ found Dr. Vicker did very little actual examination and relied on Plaintiff's self-report, which as discussed above, was found unreliable. (*Id.*) This is a legitimate reason for rejecting a treating physician's opinion. *Fair*, 885 F.2d at 605. The ALJ also found Dr. Vicker's examinations on July 3 and March 14, 2006, did not include findings that would support the severe limitations indicated in the July 5, 2006, conclusory report.

(Tr. 21.) The record indicates Dr. Vicker noted Plaintiff reported her headaches responded well to medication. (Tr. 144, 149.)

Further, Dr. Holland, from Dr. Vicker's clinic, examined Plaintiff in October 2005 and noted elbow pain and leg swelling problems due to excessive salt intake. There was no indication that the swelling was more than a situational condition caused by Plaintiff's diet.

(Tr. 141, 176.) In contrast to Dr. Vicker's opinions, the complete clinical examination by Dr. Ho, including radiology results, revealed objective medical evidence of normal gait, excellent range of motion in her back, normal neurological exam and no significant degenerative changes to the L-spine. (Tr. 120-24.) Dr. Ho found no restrictions in standing, walking, sitting or bending, and an ability to lift 25 pounds occasionally with no postural limitations.

(Tr. 121.) The ALJ's reasons for giving Dr. Vicker's brief, unsupported opinions little weight are legally sufficient and supported by the record.

#### 4. Step Four - Past Relevant Work

Plaintiff contends the hypothetical question posed to the vocational expert at step four did not include all of her limitations, and therefore the vocational expert's opinion that she could return to her prior work as a dietary aide as performed is not

1 supported by substantial evidence. (Tr. 195; Ct. Rec. 25 at 16-17.)  
2 As discussed above, the ALJ did not err in her rejection of Dr.  
3 Vicker's conclusory opinions regarding Plaintiff's limitations and  
4 she did not err in finding Plaintiff's subjective complaints of  
5 stress and anxiety insufficient to establish material mental  
6 limitations. The ALJ's RFC determination is supported by the record  
7 in its entirety and represents a reasonable interpretation of the  
8 evidence. The ALJ did not err in relying on the vocational expert  
9 testimony that Plaintiff retained the capacity to perform past work  
10 as dietary aide.

#### 11 CONCLUSION

12 The ALJ's findings are supported by substantial evidence and  
13 free of legal error. Accordingly,

#### 14 IT IS ORDERED:

15 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 24**) is  
16 **DENIED**.

17 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**  
18 **Rec. 27**) is **GRANTED**.

19 3. The District Court Executive is directed to file this  
20 Order and provide a copy to counsel for Plaintiff and Defendant.  
21 The file shall be **CLOSED** and judgment entered for Defendant.

22 DATED September 19, 2008.

23  
24 S/ CYNTHIA IMBROGNO  
25 UNITED STATES MAGISTRATE JUDGE  
26  
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28